IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.347 OF 2002

Sr. Luiza Fernandes,
r/o. Mother Mary Haven Convent,
Dongarpur,
Calangute, Bardez, Goa. ..... Petitioner.

V/s.

1. The State of Goa,
through the Chief Secretary,
Govt. of Goa,
Secretariat, Panaji, Goa.

2. The Joint Mamlatdar Bardez,
Mapusa, Bardez, Goa.

3. Mrs. Sabina Mascarenhas,

4. Mr. Adrian Fernandes,

5. Mr. Manuel Fernandes,

6. Mrs. Milagrina Fernandes,
All residents of H.No. 188,
Gauravaddo, Calagute, Bardez, Goa. ..... Respondents.

Mr. Joseph Vaz, Advocate for the petitioner.

Mr. P. A. Kamat, Advocate for the respondents No.4 and 5.

CORAM : R.M.S. KHANDEPARKAR, J.

DATE : 8TH SEPTEMBER, 2006.

ORAL JUDGMENT :

Heard. The petitioner challenges order dated 17.9.1990, as well as the order passed on 31.5.1991 passed by the respondent No.2 under the provisions of the Goa Mundkars (Protection from Eviction) Act, 1975 (hereinafter, called as "the said Act").

2. The petitioner is a co-owner of the property bearing Survey No. 148/21 situate at Calangute. The property comprised of coconut grove, wherein the respondent No.3 and her late husband by name Alex Fernandes had raised a hut covering an area admeasuring 150 sq. metres, which was noticed by the petitioner while she had been to the property on 31.3.1977. The petitioner thereupon filed the Civil Suit No. 63/97/B in the Court of Civil Judge, Senior Division, Mapusa for demolition of the said structure and for restoration of the land to its original condition. In the written statement filed by the respondent No.3 and her husband, they raised issue of mundkarship under the said Act and consequently, the issue was referred by the trial Court to the Mamlatdar for its adjudication in terms of the said Act. When the matter came up before the Mamlatdar on two occasions, the respondent No.3 failed to appear before the Mamlatdar Court and consequently, the Mamlatdar by his order dated 15/4/87 declared that the respondents No.3 to 6 were not the mundkars under the said Act. The suit proceeded ex parte on account of failure on the part of the respondent No.3 to appear before the Civil Court also. Ultimately, the Civil Court by Judgment dated 7.4.1988 ordered

demolition of the construction which was carried out by the respondents No.3 to 6 in the said property. The petitioner thereupon filed the execution proceedings, wherein the respondents No.3 to 6 raised the plea that no demolition should be carried out as the parties had entered into an agreement for settlement whereby the respondents No.3 agreed to purchase the suit structure and the property. Consequently, the agreement to that effect was entered into. However, the respondent no.3 did not comply with the terms of the said agreement and the petitioner pressed for execution of the decree. Thereupon, the respondents No.3 to 6 objected to the execution of the decree contending that the agreement was not genuine and further that the respondents are mundkars under the said Act. After necessary inquiry by the executing Court, it decided to proceed with the execution and an order to that effect was passed on 12th June, 2001. Meanwhile, the application filed by the respondent No.3 for her registration as mundkar was processed through and the Mamlatdar by his Order dated 17.9.1990 declared the respondent No.3 as mundkar in respect of the house in the property. The respondent No.3 further proceeded to initiate purchase proceedings under the said Act and, thereafter, Mamlatdar passed the purchase Order dated 31st May, 1991 in favour of the respondent No.3. Having learnt about the same, the petitioner filed an appeal before the Collector along with an application for condonation of delay, but the same was dismissed on 22.1.1999. The petitioner, thereafter, filed a suit for declaration that the orders

obtained by the respondents in 1990 as well as in 1991 regarding declaration and purchase of the property to be declared as null and void. However, realising the fate of the suit, in view of the provisions of law comprised under Section 31 of the said Act, the present petition was filed and thereafter, the suit was withdrawn.

3. At the time of issuance of Rule in the present petition, the matter relating to the preliminary objections on the part of the respondents on the ground of availability of alternative efficacious remedy to the petitioner as well as laches on the part of the petitioner in approaching this Court in writ jurisdiction, were kept open for being dealt with at the time of final disposal.

4. The learned Advocate appearing for the petitioner submitted that the authorities acting under the said Act dealing with the issue regarding the mundkarship of the parties are quasi-judicial authorities and being so, they have to act within the parameters of law as prescribed under the said Act. He further submitted that the said Act no where provides for review powers to the said authorities. Therefore, in the absence of such review powers, the authorities are not empowered to review their earlier orders passed under the said Act. He further submitted that the authority under the said Act in 1987 had clearly rejected the claim of the respondent No.3 as the mundkar and therefore, the very same authority could not have passed

the order subsequently declaring the respondent No.3 to be the mundkar, which virtually amounts to reviewing its earlier order. Considering the same, according to the learned Advocate, the Order dated 17/9/1990 passed under Section 29 of the said Act should be declared as null and void, the same being without jurisdiction. In that regard, reliance was sought to be placed in the decision of the Apex Court **H.C. Suman and anr. Vs. Rehabilitation Ministry Employees' Co-operative House uilding Society Ltd., New Delhi and ors.,** reported in (1991) 4 SCC 485. It is further contended that pursuant to the order passed by the Mamlatdar on 15.4.1987 rejecting the claim of mundkarship of the respondent No.3, the suit proceeded further and ultimately the suit was decreed. The said order dated 15.4.1987 was not challenged by the respondent No.3. Therefore, the order has attained finality for all purposes. Being so, it was not permissible for the authorities under the said Act to review the said order which had attained finality. In that connection, reliance is sought to be placed in the decision of the Division Bench of this Court in the matter of **Govind Anantrao Upadhya and ors. Vs. State of Maharashtra & ors.,** reported in 2001(3) Bom.C.R. 587. The reliance is also sought to be placed in the decision of the Apex Court in the matter of **Dr. Smt. Kuntesh Gupta vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and ors.,** reported in AIR 1987 SC 2186 in support of his contention that the order passed by the

authority on 17.9.90 is without jurisdiction and, therefore, bad in law. In short, the contention on behalf of the petitioner is that the order dated 15.4.87 having attained finality and there being no power to review under the said Act to the Authorities acting under the said Act, the Order dated 17.9.90 is without jurisdiction and hence *ab initio* bad in law.

5. The learned Advocate appearing for the respondents, on the other hand, submitted that the Order of 15.4.87 was in relation to the hut and the extension in the property and did not relate to the house in respect of which the order dated 17.9.90 has been passed. The two orders refer to the two different structures, and therefore the order dated 17.9.90 can neither be said to be in the nature of review of the earlier order, nor it can be said to be without jurisdiction as the said order has been passed specifically in terms of the provisions of Section 29 of the said Act. He further submitted that the petitioner had alternative remedy in the form of appeal against the order dated 17.9.90 and having not chosen the same, the petitioner is not entitled to assail the said order in writ jurisdiction. He has further submitted that the petition suffers from laches inasmuch as that in the present petition the petitioner seeks to challenge the orders passed in the year 1990 and 1991 by filing the petition in the year 2002. There is absolutely no explanation submitted by the petitioner for delay in approaching this Court and on that count itself the petition should be

dismissed. It is his further case that while in the suit filed by the petitioner the house described therein is different from the house which is in occupation of the respondent No.3 as a mundkar and the area of the house in the suit covers an area of 50 sq. metres, whereas the house in respect of which she has been declared as the mundkar occupies an area of 148 sq. metres. According to the learned Advocate, the issue of mundkarship which was referred to the Mamlatdar by the Civil Court did not relate to the house in respect of which the registration under Section 29 of the said Act has been granted and further, the purchase proceedings have been undertaken in favour of the respondent No.3.

6. The learned Advocate appearing for the petitioner, in response to the contention sought to be raised on the ground of laches, submitted that the petitioner immediately after knowledge about the purchase proceedings and the order dated 17.9.90 sought to challenge the same by filing an appeal along with an application for condonation of delay before the Collector under the said Act. However, the application for condonation of delay was dismissed and consequently, the petitioner could not pursue the matter in appeal against the said order. Thereafter the petitioner filed the suit. However, considering the provisions of Section 31 of the said Act, the petitioner, thereafter filed the present petition. In the facts and circumstances of the case, according to the learned Advocate for the petitioner, therefore, the

delay stands explained and the petition should not be dismissed on the ground of laches. In that regard, reliance is sought to be placed in the decision of the Apex Court in the matter of **K. Thimmappa and ors. Vs. Chairman, Central Board of Directors, State Bank of India, and anr.,** reported in (2001) 2 SCC 259. As regards the plea regarding availability of alternative relief, the learned Advocate for the petitioner has submitted that the petitioner did try to explore the alternative remedy by way of filing an appeal. However, the appellate Authority refused to condone the delay and therefore, the petitioner is left with no alternative, but to approach this Court in writ jurisdiction. He further submitted that the order dated 17.9.90 being *ab initio* bad in law, the provisions regarding alternative relief would be of no help to the respondents to non-suit the petitioner.

7. The first point which arises for consideration is in relation to the preliminary objections pertaining to the laches sought to be raised on behalf of the respondents. There is no doubt that the petitioner by the present petition is seeking to challenge the orders passed in the year 1990 and 1991 by filing the present petition in the year 2002. However, the petitioner in his petition has stated and it is also revealed from the records that the petitioner was not sleeping over her right to react against the orders passed in the years 1990 and 1991 all these years. It is the case of the petitioner that the moment the petitioner came to know about the orders passed in the

years 1990 and 1991, she attempted to react against the said orders by filing proper proceedings in the form of an appeal along with an application for condonation of delay. However, the appellate authority was not convinced about the justification submitted by the application for condonation of delay and, therefore, the same was rejected. Moreover, the petitioner thereafter filed the suit to challenge those orders. On legal advice, having realized that such a suit was not maintable in view of the provisions comprised under Section 32 of the said Act, the petitioner thereafter, filed the present petition. In the background of these facts, it cannot be said that the petitioner was totally inactive or had been thoroughly negligent in perusing the matter against the orders passed in the years 1990 and 1991. The petitioner had reacted against those orders by filing the appeal along with the application for condonation and again by filing the suit and thereafter preferred the resent petition. Being so, some delay by itself, cannot be a justification to reject this writ petition at this stage. Besides, the matter relates to the rights to immovable property and it is not the case of the respondents that on account of delay the petitioner has lost her right to the property as such. In these circumstances, therefore, mere delay in invoking the writ jurisdiction in the facts and circumstances of the case cannot be a justification to non-suit the petitioner at this stage.

8. The second preliminary objection which is sought to be

raised relates to the availability of alternative efficacious remedy to the petitioner. Undisputedly, the petitioner had filed an appeal along with the application for condonation of delay in filing the appeal and the same was dismissed. Being so, it is not the case of availability of alternative efficacious remedy, but the matter will have to be considered as to whether in the facts and circumstances of the case, the Court needs to look into the matter to impart fair justice to the parties. In the peculiar facts and circumstances of the case in hand, whether the availability of alternative remedy would debar the party from approaching the Court will have to be decided after considering the merits of the case and not by ignoring the same. Being so, this issue will have to be considered along with the merits of the case.

9. The main contention of the petitioner is that the order dated 17.9.1990 is in the nature of review of the order dated 15.4.1987 by the same authority under the provisions of the said Act; whereas it is the contention of the respondents that the two orders relate to two different premises. If one peruses the Judgment and Decree passed in the Civil Suit No.63/77/B which was filed by the petitioner against the respondent No.3, it is apparent that the suit was filed for demolition of illegal structure stated to have been erected by the respondent No.3, for eviction of the respondent No.3 from the land occupied by the said structure and the shed in the said property. In defence, it was the case of the respondents that they were residing in

the suit house as the mundkars since 1956 and that they had reconstructed the western part of their house which was on the same plinth as earlier, without occupying any extra land and is entitled under the said Act to purchase the dwelling house to the extent of 300 sq. metres. It was further their case that they had not carried out any new construction, but they had carried out reconstruction of the part of their house on the existing plinth with the oral permission of the petitioner. The suit shed was a temporary one and it was erected only to be used during summer season. In the background of these facts, the trial Court had framed the following issues :

1. Whether the defendants are occupying house E 188 with an area of 50 sq. metres for the last fifteen years ?

2. Whether the defendants have no right to reconstruct the suit structure ?

3. Whether the defendants have constructed temporary shed, covering an area of 3 metres into four metres, of bamboos and dried palm leaves, without permission of plaintiff ?

4. Whether the defendant is a mundkar of the plaintiff regarding suit structure and suit shed and has right of reconstruction?

5. Whether the plaintiff is entitled to the reliefs prayed for?

Issue No.4 which related to the claim of mundkarship by the respondents was referred to the Mamlatdar in terms of Section 32 of the said Act. When the matter was referred to the Mamlatdar, the

respondent No.3 failed to appear before the Mamlatdar. Consequently, the reference was disposed of ex parte by rejecting the claim of mundkarship of the respondents. On return, the reference negating the claim of mundkarship of the respondents, the suit proceeded ex parte on account of failure on the part of the respondents to appear before the Civil Court. Ultimately, the suit was decreed whereby the respondents were directed to demolish the suit structure admeasuring 6 metres east-west and 7 metres north-south and demolish the suit shed occupying an area of 3 x 4 metres and restore the land to its original condition to the plaintiff and further the respondents were restrained from doing any construction in the suit property.

10. As already stated above, the issue which was referred to the Mamlatdar specifically referred to the suit structure and the suit shed and right to reconstruct the same. It did not refer to any house as such, nor it related to the house which was subject-matter of the issue No.1. Neither the Judgment passed by the Civil Court, nor any other materials placed in this petition disclose the said issue had referred to any structure other than the suit structure and the suit shed. If one peruses the said Judgment, the suit structure has been specifically described as one admeasuring 6 x 7 metres; whereas the suit shed as admeasuring 3 x 4 metres. As against this, the house which is referred to in issue No.1 is said to have an area of 50 sq.

metres. The house which is claimed and the subject-matter of the order of 17.9.1990 is said to have plinth of 148 sq. metres. In other words, by no stretch of imagination, the issue No.4 which related to the suit structure admeasuring 7 x 6 metres and the suit shed occupying an area of 4 x 3 metres can be said to refer to either an area of 50 sq. metres or an area of 148 sq. metres. In these circumstances, one fails to understand how the order dated 15.4.87 rejecting the claim of mundkarship of the respondents can be said to refer to either the house occupying an area of 50 sq. metres, or the house occupying an area of 149 sq. metres. On the other hand, the suit structure and suit shed having been specifically described in the Judgment of the Civil Court and those being no where described as subject-matter of the order of 17.9.1990, it is difficult to accept the contention on behalf of the petitioner that order of 17.9.1990 would amount to reviving the order dated 15.4.1987.

11. Undoubtedly, the order dated 15.4.87 was passed under the provisions of Section 8A of the said Act; whereas the order dated 17.9.90 was passed under the provision of Section 29 of the said Act. Once the proceedings in relation to a particular subject-matter under Sections 8-A get over, it is not permissible for the Authorities under the said Act to reopen those proceedings under Section 29. The proceedings under Section 29 are in summary nature. Being so, once a final adjudication is arrived at in the proceedings under Section 8A,

it would not be open for the parties to re-adjudicate the same issue again in a summary proceedings under Section 29 of the said Act. In order to take benefit of absence of such powers under Section 29 in relation to the adjudication already done under Section 8A, the subject matter of both the provisions should be one and the same. The bar for summary proceedings under Section 29 would not apply to the premises which are not subject-matter of the proceedings under section 8A of the said Act. Being so, before invoking about bar in this regard under Section 29, the party will have to establish that the subject-matter of the proceedings under Section 29 are the same which were one of the proceedings under Section 8A. Undoubtedly, the petitioner in the case in hand has not succeeded in establishing the said fact. On the contrary, the plain reading of the Judgment of the Civil Court and comparing the same with the order passed by the Mamlatdar on 17.9.90, read with order dated 31.5.91, no where discloses that the suit structure and the suit shed which were subject-matters of the proceedings under Section 8A, to have been included in the adjudication under Section 29 in the order dated 17.9.90 and in the order dated 31.5.91. Being so, the contention that the respondent No.2 could not have reviewed its earlier order dated 15.4.87 by subsequent order dated 17.9.90 is to be held as devoid of any substance. Once it is clear that the order of 17.9.90 cannot be said to be an order reviewing its earlier order dated 15.4.87, all other issues which are sought to be raised need not be gone into, nor required to

be considered. Even the preliminary objections regarding availability of alternative remedy or that the petition suffers from laches are of no consequence for deciding the matter in issue. For the same reason, it is not necessary to refer to the various Judgments sought to be relied upon.

12. Needless to say that the decision in this petition shall not come in the way of the petitioner in getting the decree in the Civil Suit duly executed through the Civil Court.

13. For the reasons stated above, therefore, the petition fails and is, thereby, dismissed. Rule is discharged. No order as to costs.

R.M.S. KHANDEPARKAR, J.

Ssm.